IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1027

JOHN DOE, *et al.*,

Petitioners,

v.

JOHN L. McMILLAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT S. CATZ
BURTON D. WECHSLER
Urban Law Institute
of the Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Counsel for Petitioners

Of Counsel:

SUSAN McDUFFIE
MABLE CHU
Washington, D.C.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 29, 1977.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Columbia is set out in the Pet. App. pp. 1a-2a. The opinion of the United States

Court of Appeals for the District of Columbia Circuit, unreported at this time, is set out in the Pet. App. pp. 3a-17a. The order of the United States Court of Appeals denying rehearing with Judge Leventhal's concurring statement is set out in the Pet. App. 18a-21a.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1977. A timely petition for rehearing was denied on October 13, 1977. On December 8, 1977, Mr. Chief Justice Burger extended the time for filing this petition to and including February 13, 1978. [Pet. App. 22a] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Congressional functionaries exceed the legitimate legislative needs of Congress, and hence the limits of Speech or Debate Clause immunity, when they widely distributed actionable material at home and abroad to such diverse recipients as major newspapers and newspaper chains, large corporations and associations, foreign legations, public and private libraries, publishing houses, law firms and private individuals?

2. Is the immunity of Congressional functionaries, like that of congressmen, limited to the Speech or Debate Clause?[1]

3. Did the Court's prior holding in *Doe v. McMillan* preclude the petitioners, on remand to the district court, from amending their complaint to allege a public distribution of widely distributed actionable material by Congressional respondents?

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Art. I §6, cl. 1 provides that:

> . . . for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other place.

STATEMENT OF THE CASE

On January 8, 1971, the petitioners brought this action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all others similarly situated. The named defendants included the Chairman and members of the House Committee on the District of Columbia; the

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[1] On January 3, 1978, the Solicitor General petitioned the Court for a writ of certiorari in Powell v. Dellums, No. 77-955, asking for review on this question. Petitioners suggest that consideration of the petition in Powell be deferred until such time as the Court has the benefit of the Solicitor General's response in the instant case.

Clerk, Staff Director, and Counsel for the Committee; a consultant and an investigator for the Committee; District of Columbia Public School officials; and the United States.

Petitioners alleged that their common-law and constitutionally protected rights to privacy had been violated as a result of defendant's gathering, publishing and disseminating confidential and derogatory information regarding certain school children at several District of Columbia schools. The actionable material was published by the Government Printing Office in a Report of the House District Committee (H.R. Report No. 91-1681, 91st Cong., 2d Sess.).

The district court, after a hearing on a motion for a temporary restraining order, dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged. The court of appeals affirmed, 459 F.2d 1304 (D.C. Cir. 1972) (Wright, J., dissenting). On certiorari, this Court reversed in part and affirmed in part, and remanded the case to the district court for further proceedings, *Doe v. McMillan*, 412 U.S. 306, 324 (1973).

In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court held that the Congressional defendants were immune from liability under the Speech and Debate Clause as long as they engaged in conduct within the sphere of legitimate legislative activity. This Court, however, made clear that the Speech and Debate Clause gives no automatic immunity to congressmen or their functionaries who distribute actionable material to the public at large. Such activity was clearly outside the limit of the "legislative needs" of Congress and should not be protected. But, since petitioners had failed to allege

public distribution by the congressmen and their aides, the Court affirmed the district court's dismissal as to the Congressional defendants. Because petitioners alleged a public distribution by the Public Printer and Superintendent of Public Documents, the Court remanded the case for further proceedings to determine the extent of the publication and distribution of the Report. *Id.* at 324. The Court could not determine from the state of the record whether the legitimate legislative needs of Congress and hence the limits of Speech and Debate Clause immunity had been exceeded. *Id.*

On remand from this Court, the court of appeals directed the parties to file memoranda suggesting what further action the court of appeals should take in view of this Court's decision. Petitioners advised the court of appeals of their intention to amend the original complaint to allege public distribution by the Congressional defendants. On October 15, 1973 the court of appeals remanded the case to the district court without special instructions.

On remand to the district court, the case was reassigned to another judge on February 14, 1974, who held a status call on March 7, 1974. At the status call, petitioners informed the district court of their intention to amend the original complaint alleging public distribution of the Report by the Congressional defendants and their aides. On March 27, 1974, petitioners moved the district court to amend their complaint as previously announced at the status call. On April 29, 1974 the district court denied petitioner's motion for leave to amend, because petitioners were "estopped by virtue of the Supreme Court's above-

mentioned opinion from amending their complaint as to those defendants whose dismissals were affirmed."[2] [Pet. App. 31a].

On April 29, 1974, the district court granted the remaining defendants' motion for summary judgment. The court based its decision on an affidavit [Pet. App. 33a] submitted by the Public Printer which stated that the printing and distribution of the actionable report were "routine, usual and as a matter of course, followed the same regular customary and orderly procedures as requisitions for all Congressional printing." [Pet. App. 25a] The district court held that the distribution did not exceed the legitimate legislative needs of Congress and therefore was protected by the Speech and Debate Clause.

On April 28, 1975 the court of appeals remanded the case to the district court to reconsider its prior decision. The remand was ordered because the Public Printer had informed the court of appeals that, contrary to his prior affidavit, there had been public distribution of the Report.

On remand to the district court, the Public Printer filed a supplemental affidavit. [Pet. App. 42a] Specifically, the affidavit revealed that a substantial number of copies of the Report had been distributed to various private persons, institutions and foreign legations. Some of the recipients included the New York Times, Chicago Tribune, American Medical Association, and several public and university libraries. *Id.* On July 10, 1975, despite evidence of widely distributed

[2] Subsequent efforts to amend the complaint were also denied by the district court.

actionable material contained in the Report, the district court reaffirmed its prior order of dismissal finding that "the extent of publication and distribution of the Report did not exceed the legitimate needs of Congress." [Pet. App. 2a]

Petitioners appealed to the court of appeals, urging that the distribution of the actionable Report to the public at large, exceeded the scope of Speech and Debate Clause immunity. On July 29, 1977, the court of appeals affirmed the order of dismissal. [Pet. App. 3a]. The court of appeals held that the distribution of the Report was routine and performed an informing function and was thus protected by Speech and Debate Clause immunity; that the defendants were also entitled to qualified immunity beyond the Speech and Debate Clause; and that the district court did not abuse its discretion in denying leave to amend the complaint. [Pet. App. 8a-15a] On October 13, 1977, the court of appeals denied a timely motion for rehearing. [Pet. App. 18a]

Petitioners originally brought this action to seek vindication of constitutionally protected rights. At every turn they have encountered procedural roadblocks.[3] Both the district court and the court of appeals have clearly evaded this Court's prior mandate when it remanded the case for further proceedings.

[3] For example, on the initial remand to the district court, petitioners were not permitted to engage in discovery to determine the extent and scope of the distribution of the Report.

REASONS FOR GRANTING THE WRIT

I.

SPEECH OR DEBATE CLAUSE

A. This Court's Holding in *Doe v. McMillan*.

This Court held in *Doe v. McMillan*, 412 U.S. 306, 316 (1973), that "the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity." The Court restated this conclusion in various ways: "A general, public dissemination of material otherwise actionable under local law is not protected by the Speech or Debate Clause . . ." *Id.* at 317. The Speech or Debate Clause "does not immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." *Id.* at 315-16. It does not protect "general public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the due functioning of the legislative process." *Id.*

Plaintiffs alleged just such a public distribution by the Printer defendants. But because the district court immediately dismissed the case before any pre-trial discovery, this Court was "unaware, from the record, of the extent of the publication and distribution of the Report . . ." *Id.* at 324. The function of the remand, therefore, was to allow for a full development of the record of the defendants' distribution.

B. The Record of Distribution.

On remand the Printer defendants, in their motion for summary judgment, filed an affidavit showing they had made extensive distribution of the material to the public, which, petitioners contend, went far beyond the legitimate legislative needs of Congress: to such major newspapers and newspaper chains as the New York Times, Chicago Tribune, Scripps-Howard Newspaper Alliance; to some of the world's largest corporations–American Telephone and Telegraph, International Harvester, Union Pacific, Lockheed Aircraft; to associations with far-flung memberships–National Association of Electric Companies, American Farm Bureau, Federal Bar Foundation, American Medical Association; to publishing houses–Prentice Hall, Bureau of National Affairs, Commerce Clearing House [forty (40) copies]; to public and private libraries, located at home and abroad, in New York, Illinois, Massachusetts, California, Connecticut, Nebraska, New Jersey, Michigan, Colorado, Canada; to eighty (80) foreign legations like the Australian Consulate and the Camera Deputati in Rome, Italy; to large law firms–Wilmer, Cutler and Pickering in Washington, D.C. and Donavan, Leisure, Newton, Lumbard, and Irving in New York; and finally, to private individuals. [Pet. App. 53a-60a]

Surely this distribution exceeded the bounds of Speech or Debate.

C. Defenses to Excessive Distribution.

The courts below nonetheless held this distribution, of such extraordinary scope, immunized by the Speech or Debate Clause because it was routine and ordinary and part of the informing function of Congress. Both holdings are at odds with this Court's opinion in this case.

The Printer defendants customarily mailed thousands of copies of all Congressional Reports to various governmental agencies and to private persons and institutions who had standing orders.[4] They argued here that because their distribution of the Report in this case was "routine, usual and . . . followed the same regular, customary and orderly procedures for distribution,"[5] it was protected by the Speech or Debate Clause.

But this Court denied constitutional immunity to Congressional conduct simply because it was regularly or generally practiced.

> Our cases make perfectly apparent . . . that everything a Member of Congress *may regularly do is not a legislative act within the protection of the Speech or Debate Clause.* The Clause has not been extended beyond the legislative sphere and legislative acts are not all encompassing. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this *conduct, though generally done, is not protected legislative activity.*

Id. at 313 (emphasis added).

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[4] Affidavit of Thomas F. McCormick Pet. App. 45a-48a.

[5] Id. at 52a.

Since members of Congress are not protected by routine and regular conduct, then neither are the Superintendent of Documents and the Public Printer whose immunity derives from Congress.[6]

The argument that the "informing function of Congress" immunized the distribution of the Report fares no better.

> We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, simply because authorized by Congress, must always be considered an integral part of the deliberative and communicative processes by which Members participate in Committee and House proceedings.
>
> * * *
>
> [W]e cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be. . . . To hold otherwise would be to invite gratuitous injury to citizens for little public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law.

Id. at 314-17.

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[6] Moreover, it is well settled that mere past patterns of practice cannot legitimize unconstitutional activity. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

Neither routine practice nor Congress' informing function provide a constitutional shield for the distribution of the actionable material which took place in this case. In holding otherwise, the courts below clearly erred.

II.

OFFICIAL IMMUNITY

The court of appeals, believing this Court's *Doe* opinion dealt solely with *absolute* immunity and the Speech or Debate Clause, went on to hold that the Printer defendants had, apart from Speech or Debate, a *qualified* immunity, that is, and in this context, one based on good faith; and that in this case the Printers had in fact acted in good faith. But the court of appeals misread this Court's opinion. This Court reasoned as follows: the Constitution provided Printer defendants with no immunity apart from Speech or Debate; neither did Congress; no independent immunity attaches to the Printers; what immunity they have is derivative; in this instance, their immunity derives from Congress; Congress has no immunity apart from Speech or Debate; neither, therefore do the Printer defendants. *Id.* at 324.

> The business of Congress is to legislate; congressmen and their aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney v. Brandhove* . . . they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Id. at 324-25.

The court of appeals' finding of qualified immunity not only conflicts with *Doe* but is contrary to every case decided by this Court where congressmen or their aides were held unprotected by the Speech or Debate Clause.[7] None were ever saved from injunctive or monetary liability by any other form of immunity. Had there existed any immunity apart from Speech or Debate, the Court would have been forced to face it in those cases. But it never gave the slightest intimation any such immunity existed. Neither did it do so in any case where Speech or Debate prevailed.[8]

In sum, due to the scope of the public distribution of the actionable material, the Printer defendants lost their immunity under the Speech or Debate Clause. They have no other.[9]

III.

AMENDMENT OF THE ORIGINAL COMPLAINT ON REMAND FROM THIS COURT.

This Court held in *Doe* that even though the Congressional defendants were immunized by the

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[7] United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972); Powell v. McCormack, 395, 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Kilbourn v. Thompson, 103 U.S. 169 (1881).

[8] Tenney v. Brandhove, 341 U.S. 367 (1951); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[9] For confirmation of this reading of Doe, *see The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 221-31 (1973).

Speech and Debate Clause for preparing the actionable Report, they could be liable for public distribution.

> [W]e cannot accept the proposition that in order to perform its legislative function, Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be.

Id. at 316.

The Court's decision to affirm dismissal of the Congressional defendants was based on its reading of the complaint.

> It does not expressly appear from the complaint, nor is it contended in this Court, that either the members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the report, and authorize its publication. The complaint, was, therefore, dismissed as to those respondents. Other respondents, however, are alleged to have carried out a public distribution and to be ready to continue such dissemination.

Id. at 317-18.

Had the original complaint alleged a public distribution by the Congressional defendants and their functionaries, the Court would have reversed their dismissal. On remand, the district court denied petitioners' motion for leave to amend the complaint to include allegations of public distribution by these defendants. The district court read this Court's holding in *Doe* as precluding amendment of the complaint "as to those defendants whose dismissals were affirmed." [Pet. App. 31a] The court of appeals affirmed, finding no abuse of discretion by the district court.

Again, there is nothing in the Court's holding in *Doe* that petitioners were estopped from amending their complaint on remand. And neither court below bothered to buttress its contrary conclusion with quotations or page citations. This Court has held that leave to amend shall be freely given when justice so requires. *Foman v. Davis*, 371 U.S. 178, 182-83 (1962).

> The Federal Rules reject the approach that pleadings is a game of skill which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of the pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 48 (1957); *United States v. Houghan*, 364 U.S. 310, 317 (1960).

The principal objective of this litigation has always been to reach those members of Congress and their aides responsible for the dissemination of the degrading Report which seriously damaged the lives and reputations of innocent school children. The district court's refusal to permit amendment of the complaint offends the principal that the purpose of "pleading is to facilitate a proper decision on the merits" in a case where justice so requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON D. WECHSLER
ROBERT S. CATZ
The Urban Law Institute
of the Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Counsel for Petitioners

Of Counsel:
SUSAN McDUFFIE
MABLE CHU
Washington, D.C.

January 1978

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 56-71
JOHN L. McMILLAN *et al.*, Defendants.	)	

ORDER

This matter having come before the Court pursuant to Order of the Court of Appeals filed April 28, 1975, in the above-entitled action which Order provides in pertinent part as follows:

> It appears that the District Court in ruling on the merits of appellants' claim was presented with facts from the Public Printer and Superintendent of Documents, defendants, in regard to the distribution of the Congressional Report, subject matter of this litigation, which these defendants have since discovered to be in error. It is therefore,
>
> FURTHER ORDERED by the Court that the judgment below be vacated and the case remanded to the United States District Court for the District of Columbia to allow that Court to consider the significance of the factual error on the part of the defendants and the new facts which have since come to light.

The Public Printer and the Superintendent of Documents (defendants) have renewed their Motion to

Dismiss or, in the Alternative, for Summary Judgment. After due consideration of the record before the Court, and the Court being fully apprised in the premises, specifically finding that the printing and distribution of the Report at issue by the Government Printing Office and its personnel was entirely routine and usual; that the factual error in the prior affidavit executed by the Public Printer does not affect the Conclusions of Law or Order entered by the Court in these proceedings on April 29, 1974 in any way whatsoever; and that the record now before the Court establishes that the extent of publication and distribution of the Report did not exceed the legitimate legislative needs of Congress, it is this 10th day of July, 1975, hereby

ORDERED as follows:

(1) Defendants' Renewed Motion for Summary Judgment be, and hereby is granted;

(2) The action should be, and hereby is, dismissed.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2016

JOHN DOE, BY HIS GUARDIAN
MARY DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, CHAIRMAN OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action 56-71)

Argued April 5, 1977

Decided July 29, 1977

John S. McCreery, for appellants. *Robert S. Catz*, also entered an appearance for apellants.

Barbara L. Herwig, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *Robert E. Kopp*, Attorney, Department of Justice, were on the brief for appellees, the Superintendent of Documents and the Public Printer. *William Kanter*, Attorney, Department of Justice, also entered an appearance for appellees, the Superintendent of Documents and the Public Printer.

Benton L. Becker and *Fred M. Vinson*, entered appearances for Congressional Appellees.

David P. Sutton, Assistant Corporation Counsel for the District of Columbia, entered an appearance for District of Columbia appellees.

Before TAMM, LEVENTHAL, and MACKINNON, *Circuit Judges.*

Opinion for the court Per Curiam.

PER CURIAM: Appellants filed suit against various Members of Congress, their staffs and consultants, District of Columbia school officials, and the Public Printer and Superintendent of Public Documents, seeking declaratory and injunctive relief and damages based on the publication of a congressional report containing material claimed to invade their privacy. The district court dismissed their suit, and this court affirmed. The Supreme Court affirmed the dismissal as to the congressional and District of Columbia defendants, but remanded for further proceedings as to the Printer and Superintendent. On remand, the district court again dismissed and denied appellants' request for leave to amend their complaint. The present appeal was filed.

I.

On December 8, 1970, a report of the House of Representatives Committee on the District of Columbia dealing with problems in the District school system was published, H.R. REP. NO. 91-1681, 91st Cong., 2d Sess. (1970). Included in the 459-page report were some 64 pages of absentee lists, memoranda on student disciplinary problems, and unsatisfactory student test papers, all of which identified the students involved. Various of these students and their parents, proceeding *in forma pauperis* and under assumed names to preserve anonymity, filed this class action in the district court on January 8, 1971, charging that the publication of these pages violated their constitutional and common-law right to privacy and other rights. They sought declaratory and injunctive relief and damages. Named as defendants were the members of the House Committee and various staff members and the investigator (congressional defendants), the Superintendent of Public Documents and Public Printer (Printer defendants), various District of Columbia school officials, including the members of the Board of Education (District defendants), and the United States. The district court denied appellants' motion for temporary relief and dismissed their complaint. This court granted an injunction pending appeal, but denied appellants' motion for summary reversal, 143 U.S.App.D.C. 157, 442 F.2d 879 (1971). We subsequently affirmed the district court's dismissal of the complaint against all defendants, holding that in compiling and publishing the report the defendant Members of Congress and legislative employees [1] were "acting in the sphere of legitimate legislative activity," and were therefore protected from suit by the Speech or Debate Clause of the Constitution, Article I, § 6, cl. 1. Our decision further held that the legislative employees and Dis-

[1] We considered the immunity of the Printer and Superintendent to be identical to that of the legislative employees.

trict defendants had performed "discretionary" duties in furtherance of a valid legislative purpose, with proper congressional authorization, and so were protected by judicially-made "official immunity" under *Barr v. Mateo*, 360 U.S. 564 (1959). Finding adequate the assurance of the Federal appellees that no further distribution of the report was planned, we denied injunctive relief. 148 U.S. App.D.C. 280, 289-94, 459 F.2d 1304, 1313-18 (1972).

The Supreme Court granted certiorari and affirmed this court's decision as to the Members of Congress, their staffs and consultant, 412 U.S. 306, 314-18 (1973), finding that their acts extended only to the preparation of the report and the order that it be printed. In addition, the Court "[did] not disturb" this court's decision as to the District defendants, 412 U.S. at 324 n.15, and left standing the denial of injunctive relief, 412 U.S. at 318. It held, however, that the immunity of the Printer defendants went no farther than that of the Members of Congress whom they served, and that the complaint against these defendants should not have been dismissed on official immunity grounds before the question was resolved "whether any part of the previous publication and public distribution . . . went beyond the limits of the Speech or Debate Clause of the Constitution," 412 U.S. at 318. The Court therefore remanded for a determination of the actual extent of distribution and whether this distribution had exceeded "the legislative needs of Congress, and hence the limits of immunity," 412 U.S. at 324.

We in turn remanded to the district court. Based on an affidavit submitted by the Public Printer and other material in the record, the district court by memorandum and order on April 29, 1974, made findings of fact and conclusions of law. It was determined that in addition to 2557 copies of the report distributed within the Congress and its staff, 796 copies were distributed to various federal government agencies based on statutory requirements

and standing orders. Another 796 copies were retained in a security cage for future distribution but because of this suit would not be distributed. About 54 "extra" copies were retained by the Printer for internal use and for distribution in case of spoilage. This distribution, the district court concluded, was entirely "routine, usual and as a matter of course followed the same regular, customary and orderly procedures as requisitions for all Congressional printing and binding of bills, laws and reports from Congressional committees." Mem. op. at 2-3, R. 28. This distribution, the district court concluded as a matter of law, "did not exceed the legitimate legislative needs of Congress and thus their actions remained within the limits of the immunity of the Speech or Debate Clause and the doctrine of official immunity." Mem. op. at 7. Finding no material issues of fact remaining, the district court entered summary judgment for the appellees, and by a separate order denied appellants' motions for leave to amend their complaint to modify the cause of action and add a District of Columbia defendant. On May 22, 1974, the district court denied appellants' motion for a new trial, alteration of judgment and amendment of findings of fact and conclusions of law, and appellants noted an appeal.[2]

In a memorandum filed on that appeal, the Printer appellees stated that, contrary to the Printer's earlier affidavit, there had in fact been some distribution of the report outside the federal government. This court vacated the district court's judgment and remanded to permit it to consider the significance of this factual error, No. 74-1812 (D.C. Cir. April 28, 1975). On remand, the Printer appelles submitted new affidavits, R.39, stating that the earlier affidavit had erroneously assumed that the 796

[2] Appellants' novel "motion for clarification" of the Supreme Court opinion prior to determination of that appeal, filed November 4, 1974, was denied on December 9, 1974. 419 U.S. 1043 (1974).

copies of the report delivered to federal agencies had remained within the federal government. Rather, some of these copies were delivered by the Printer to the Superintendent, under standing requisition, and were in turn distributed pursuant to standing orders for all committee reports. It developed that about 92 copies were distributed to members of the public who maintained standing orders for all committee reports,[3] and that about 80 copies were automatically delivered to foreign legations with standing orders for all committee reports under 44 U.S.C. § 1717 (1970).[4] Other parts of the original affidavit were reaffirmed. The district court on July 10, 1975, issued an order concluding

> that the factual error in the prior affidavit executed by the Public Printer does not affect the Conclusions of Law or Order entered by the Court in these proceedings on April 29, 1974 in any way whatsoever; and that the record now before the Court established that the extent of publication and distribution of the Report did not exceed the legitimate legislative needs of Congress . . . .

R. 53. It therefore again granted appellees' motion for summary judgment and dismissed the complaint. Appeal was again taken.

II.

The principal issue raised in this appeal is whether the district court correctly held, as a matter of law, that the

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[3] Recipients included law firms, university law libraries, and law publishers such as Commerce Clearing House. Distribution had been halted before copies were distributed to depository libraries, the Library of Congress, the National Archives, or Senate Library. McCormick Affidavit, R. 39 at 5, 8, Exhibit B.

[4] 44 U.S.C. § 1717 (1970) provides: "Documents and reports may be furnished to foreign legations to the United States upon request stating those desired and requisition upon the Public Printer by the Secretary of State. . . ."

distribution it found by the Printer and Superintendent was within the scope of the immunity recognized by the Supreme Court. Appellants contend that the Court's opinion means that *any* distribution "beyond the halls of Congress," 412 U.S. at 317, transcends any "legitimate legislative needs,"[5] and so is *per se* unprotected by the Speech or Debate Clause or official immunity. Appellants read the Supreme Court's opinion much too broadly.

The Court's opinion in *Doe* does not expressly adopt the *per se* approach advocated by appellants, and its phrasing of the question addressed belies any such inference. The Court considered only "whether the act of [public distribution], simply because authorized by Congress, must *always* be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' . . . ." 412 U.S. at 314 (emphasis added), *quoting Gravel v. United States*, 408 U.S. 606, 625 (1972). In answering this question in the negative, the Court determined only that such distribution was not *necessarily privileged*, and not that it was *per se* unprivileged.[6] The Court remanded both for a

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[5] The Supreme Court in *Doe* defines the conduct protected by the Speech or Debate immunity in various terms, *e.g.*: " 'sphere of legitimate legislative activity,' " 412 U.S. at 312, 320 *quoting* Gravel v. United States, 408 U.S. 606, 624 (1972); "reasonable bounds of the legislative task," 412 U.S. at 315; "reasonable requirements of the legislative function," 412 U.S. at 316; "legitimate legislative needs of Congress," 412 U.S. at 324. We read the Supreme Court's opinion as using these terms synonymously.

[6] The Court stated the scope of its conclusion: "We only deal, in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries, *and* beyond the apparent needs of the '*due* functioning of the [legislative] process.' " 412 U.S. at 317, *quoting* United States v. Brewster, 408 U.S. 501, 516 (1972) (emphasis on *and* supplied). The Court chose the word *and* rather than the phrase *and therefore*.

determination of the actual extent of distribution, and for an initial determination whether that distribution was within the privilege:

> We are unaware, from this record, of the extent of the publication and distribution of the report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.

412 U.S. at 324-25.

Not only did the Court not foreclose the district court from finding some public distribution to fall within the immunity, but there are several indications in both the opinion for the Court and the separate opinions of the Justices that such a result was contemplated. The Court remanded because the district and circuit courts' disposition of the case had "left the question whether *any part* of the previous publication and *public distribution* by [Printer] respondents . . . went beyond the limits of the Speech or Debate Clause . . . ." 412 U.S. at 318 (emphasis added). Mr. Justice Rehnquist, in a concurring and dissenting opinion joined by the Chief Justice, Mr. Justice Blackmun, and in relevant part by Mr. Justice Stewart, stated:

> While there are intimations in today's opinion that the privilege does not cover such authorized public distribution, the ultimate holding is apparently that the District Court must take evidence and determine for itself whether such publication in this case was within the "legitimate legislative needs of Congress," . . . .

412 U.S. at 339 (Rehnquist, J., concurring and dissenting).

Moreover, both the opinion for the Court and the separate opinions recognized that the Congress possessed some "informing function." The Court's opinion acknowledged

the "importance of informing the public about the business of Congress," 412 U.S. at 314, and concluded only that public dissemination of the report was not *necessarily* within the immunity. Both the concurring opinion of Mr. Justice Douglas, with whom Mr. Justice Brennan and Mr. Justice Marshall joined, and the concurring and dissenting opinions, emphasized that informing the public concerning matters before Congress was a "legitimate legislative function." *See* 412 U.S. at 328 (Douglas, J., concurring); 412 U.S. at 332-334 (Blackmun, J., concurring and dissenting).

The Supreme Court thus left it for the district court in the first instance to determine both the actual extent of distribution *and* whether that distribution as a matter of fact and law served a "legitimate legislative need," and was therefore within the privilege. We conclude that in making this determination the district court was free to explore that issue, and the fact that some copies of the report were distributed to members of the public was not conclusive that the privilege had been exceeded. The remaining question for us, therefore, is whether the district court properly concluded that the limited distribution to various federal agencies and members of the public with standing orders for all congressional reports was within the legitimate legislative needs of the Congress.

As the district court found on the basis of the record, the distribution in this case was "routine and ordinary" and quite limited in scope; in fact considerably more limited than it would have been had routine distribution been completed. Distribution was solely to persons and agencies with standing orders for all reports, and there was no attempt by the Printer or Superintendent or anyone within their control to call attention to the report or its contents. No copies of the report were distributed in response to specific orders for that report, and there is no indication that any recipient had any particular interest

in this report. Distribution ceased as soon as objections to the report's contents were received. Such routine distribution to federal government agencies outside the Congress serves to permit comment upon proposed legislation by the agencies that may be directely affected by it, and at least where the Printer defendants had no notice that the information was likely to be misused in any way, we cannot say that such distribution is outside the legitimate legislative purposes of Congress.

We reach a similar conclusion as to the limited distribution in this case to persons outside the federal government. As stated, this distribution was limited in scope to persons with a general interest in all matters before Congress. Because of the wide breadth and magnitude of their interests, and the congressional practice in certain instances of permitting non-germane Senate amendments [7] to pending bills, some of our citizens have learned that they should obtain reports and information on all congressional activities in order to be assured to the maximum extent possible that they are informed on all their specific interests in particular matters. We cannot say that filling their standing orders for all congressional reports does not meet a legislative purpose. Distribution of such reports informs the public and permits them to comment on pending matters. It permits individuals and companies who consider their interests to be affected to take steps to exercise their constitutional right of petition. The right to petition is one of the freedoms protected by the First Amendment of the Bill of Rights. *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). This right is not limited to petitioning Congress but extends to administrative agencies and to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine*

[7] L. DESCHLER'S PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES ch. 28 § 20 (1974).

Workers v. Pennington, 381 U.S. 657, 669-670 (1965). The right to petition would be meaningless if proceedings in Congress were not publicly available. In the present instance, the report related to the conditions surrounding education in the District of Columbia and a great many people with widely varying interests and concern in that subject, and in the moneys to be appropriated by Congress for education in the District, were vitally interested in the facts that Congress found. Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable. Had not the subject report been available to the public, appellants might not have learned of its contents. This is merely one illustration of the need to make such reports generally available to the public. We need not, however, consider the proper result in a case where distribution was more extensive, was specially promoted, was made in response to specific requests rather than standing orders, or continued for a period after notice of objections was received. On the facts of the present case, the district court did not err in holding that the distribution did not exceed the "legitimate legislative needs of Congress," and in therefore entering summary judgment for the Printer appellees.

III.

The Supreme Court, this court and the district court have so far considered only whether the Printer appellees were protected by an absolute immunity under the Speech or Debate Clause or official immunity doctrine. We now consider whether, in addition, these appellees were protected by a qualified immunity. The Supreme Court has recognized a qualified immunity, available at common law and in actions under 42 U.S.C. § 1983 (1970), covering acts done in good faith and with a reasonable belief in their legality by state officers unprotected by an abso-

lute immunity. *See Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 238-49 (1972); *Pierson v. Ray*, 386 U.S. 547 (1967). This court has held as well that such a qualified immunity is available to protect federal officers whose acts, while in good faith, are outside the bounds protected by an absolute official immunity. *Apton v. Wilson*, 165 U.S.App.D.C. 22, 29-34, 506 F.2d 83, 90-95 (1974). Similarly, the Second Circuit on remand from the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), *on remand*, 456 F.2d 1339 (2d Cir. 1972), held that the agent defendants in that case were not "discretionary" officers and so were unprotected by any absolute official immunity, but nevertheless had available an affirmative defense based on "good faith and reasonable belief in the validity of the arrest and search," 456 F.2d at 1347-48.

We conclude that public policy is served by a holding that the Printer defendants in the present case have available a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity. It would serve the interests of neither the Congress nor the public to require the Printer and Superintendent, and indeed each of their employees, to impose prior censorship on all congressional documents on pain of personal liability for damages. On the record in the present case, all distribution of the report was within the scope of the Printer appellees' authority and pursuant to statutory direction or congressional orders they could have reasonably believed were valid. At the time of the distribution of which appellants complain, the Printer appellees had no notice of any potential injury from distribution of the report, and all distribution was halted as soon as such notice was received. These appellees thus acted in good faith and with a reasonable belief in the legality of their actions, and so were protected by their qualified immunity. On this alternative ground, we affirm the district court's entry of summary judgment for the Printer appellees.[8]

IV.

On remand from the Supreme Court and this court, appellants sought leave to amend their complaint to modify their cause of action against the congressional defendants and to join an additional District school official defendant. The district court denied this motion, R. 29, and appellants now assign this denial as error.

Appellants acknowledge that the Supreme Court affirmed the district court's initial dismissal of their complaint against the congressional defendants. Moreover, it does not appear from the Supreme Court's affirmance of the dismissal as to the congressional defendants that the possibility of a subsequent amendment of the complaint was contemplated:

> The complaint before us alleges that the respondents caused the Committee report "to be distributed to the public," that "distribution of the report continues to the present," and that, "unless restrained, defendants will continue to distribute and publish" damaging information about petitioners and their children. It

[8] Like the Supreme Court, 412 U.S. at 325, we again dispose of this case on immunity grounds. We thus have no occasion to determine whether appellants have stated a valid cause of action for damages for invasion of privacy. *See* Paul v. Davis, 424 U.S. 693 (1976). Nor need we resolve whether the present Public Printer, Thomas F. McCormick, became a party to the action for damages after the death of Adolphus N. Smith, the Public Printer at the time this action was commenced, *see* Spomer v. Littleton, 414 U.S. 514, 520 (1974). Finally, we do not decide whether appellants' characterization of their cause of action at oral argument as one against the Printer defendants only in their official capacities amounted to a waiver of the claim for damages. *See* United States v. Testan, 424 U.S. 392 (1976).

> does not expressly appear from the complaint, *nor is it contended in this Court*, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for suit. The complaint was therefore properly dismissed as to these respondents. . . .

412 U.S. at 317-18 (emphasis added). Nevertheless, appellants now seek to avoid this affirmance by amending their complaint to "allege public distribution of the report by the Congressional appellees," Appellants' Br. at 17.

The amendment sought here is governed by FED. R. CIV. P. 15(a), which requires either written consent of the adverse party or leave of the court, but states that "leave [to amend] shall be freely given when justice so requires." The decision to grant or deny leave to amend, however, is vested in the sound discretion of the trial court. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (dictum); *Lyons v. Board of Education*, 523 F.2d 340, 348 (8th Cir. 1975); 3 J. MOORE, FEDERAL PRACTICE ¶¶ 15.02, 15.08 (1964). "Among the more common reasons for denying leave to amend are that the amendment will result in undue prejudice to the other party, is unduly delayed, . . . or that the party has had sufficient opportunity to state a claim and has failed." 3 J. MOORE, *supra*, ¶ 15.08[4] at 897-900 (footnotes omitted). In the present case, the appellants' complaint had been before the district court, this court and the Supreme Court for over thirty-eight months before appellants filed the first of their motions for leave to file an amended complaint. As the Supreme Court noted, 412 U.S. at 317-18, quoted *supra*, appellants gave no indication before that Court of any potential change in their theory of the case. A review of the record reveals no

such indication to this court, the district court or the Government before these motions were filed, and no sound reason for the appellants' failure to seek amendment earlier. When a plaintiff seeks to file an amended complaint this tardily, it is within the sound discretion of the district court, in consideration of the potential prejudice to the other party and the interest in eventual resolution of litigation, to deny leave to amend. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 401 U.S. at 331-33; *Lyons v. Board of Education, supra; Wealdin Corp. v. Schwey*, 482 F.2d 550 (5th Cir. 1973); *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971). On the record in the present case, we do not find that the district court's denial of leave to amend was an abuse of discretion. We thus need not resolve whether the Supreme Court's opinion affirmatively precluded amendment of appellants' complaint on remand.

The district court's denial of appellants' belated attempt to add as a party defendant Mignon B. Johnson, assistant principal of Jefferson Junior High School, is affirmed for the same reason. The district court did not abuse its discretion in declining to permit the joinder of Ms. Johnson over three years after the institution of the action, and after this court had affirmed the district court's original dismissal as to the other District defendants and the Supreme Court had "not disturb[ed]" this affirmance, 412 U.S. at 324 n.15. This joinder could have seriously prejudiced her interests, and no valid reason was articulated by appellants for their failure to seek to join her earlier.

The judgment of the district court is affirmed.

Judgment accordingly.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2016

JOHN DOE, BY HIS GUARDIAN MARY DOE, ET AL., APPELLANTS

JOHN L. MCMILLAN, CHAIRMAN OF THE COMMITTEE OF THE DISTRICT OF COLUMBIA OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL

ON PETITION FOR REHEARING

(D.C. Civil 56-71)

Filed October 13, 1977

Before: TAMM, LEVENTHAL and MACKINNON, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing filed by appellants John Doe, et al., it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Statement of *Circuit Judge* LEVENTHAL concurring in the denial of the petition for rehearing.

LEVENTHAL, *Circuit Judge*, concurring: I concur in the denial of the petition for rehearing, but believe it calls for another word concerning Part IV of the per curiam opinion.

The particular issue is denial of leave to file an amended complaint against the Congressmen because of the report challenged as an egregious violation of plaintiffs' privacy. The Supreme Court's opinion affirming dismissal of the original complaint against the Congressmen stated that it was material that there had been no claim of public distribution by the Congressmen. *Doe v. McMillan*, 412 U.S. 306 (1973).

On remand, plaintiffs sought leave to amend the complaint to allege "public distribution of the report by the Congressional appellees." That motion was denied, and this was one of the grounds of appeal.

This court's opinion of affirmance rested on the ground that the amendment was tardy and this was a matter within the discretion of the district court. This ground was not briefed by the government, and I now consider it inappropriate. The occurrences in both courts, marshaled in the petition for rehearing, indicate first that plaintiff's counsel acted with reasonable expedition all things considered, and second that the district court did not purport to exercise a discretion on the ground of tardiness, but rather used other grounds that are questionable.*

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* The original complaint was dismissed a few days after it was filed. There were difficulties with seeking to amend the complaint in the trial court while the case was lodged in the appellate court. Procedures are available for use when a point is crucial, but that did not develop until the Supreme Court's ruling. The Supreme Court judgment in Doe v. McMillan issued May 29, 1973. On July 24, 1973, this court requested supplemental memoranda as to the action to be

I join in denying the petition for rehearing on the ground that it relates to a secondary issue of no current import. The principal ground of the appeal in the present case, No. 75-2016, concerned the ruling of the district court that the incidental public distribution of the report, to those who had a standing order for committee reports with the Government Printing Office, was entirely routine and usual and did not exceed the legitimate legislative needs of the Congress. This court sustained the district court, and I concur in that ruling.

The attempt to claim that the Congressional defendants participated in the public distribution was a subsidiary issue. There was no inkling that the "public distribution" now claimed as to the Congressmen was anything other than the routine distribution which the court held not to exceed the legitimate needs of Congress.

When the court is confronted with something as unusual as an attempt to sue Congressmen for participating

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taken in the light of the Supreme Court decision. Plaintiffs' counsel filed a memorandum of Aug. 23, 1973, announcing the intention to move the district court for leave to amend the complaint. This court remanded on Oct. 15, 1973. On remand, the case was reassigned to a new district judge. At his status call, plaintiffs' counsel was given two weeks to seek leave to file the amended complaint. A motion, with amended complaint attached, was filed timely on March 27, 1974.

At a session held April 17, 1974, the district court denied the motion, saying (Tr. 15): "Under the Supreme Court decision they are out of the case. I don't think you can use a vehicle denominated as an Amended Complaint to state a complete new theory and try to avoid the thrust of the statute of limitations."

On April 29, 1974, the district court entered an order which recited that "no motion for leave to file with regard to same amended complaint [relating to Congressional defendants] having been filed," and directed that the amended complaint be "stricken".

in a "public" distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a "public" distribution.

SUPREME COURT OF THE UNITED STATES

No. A-488

JOHN DOE, ET AL.,

Petitioners,

v.

JOHN L. McMILLAN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 13, 1978.

/s/ Warren E. Burger
WARREN E. BURGER
Chief Justice of the United States

Dated this 8th day of December, 1977.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 56-71
JOHN L. McMILLAN *et al.*, defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 11, 1971, shortly after the action was filed, the District Court dismissed the action as to all defendants. Thereafter, on March 11, 1971, the Court of Appeals issued an order granting some injunctive relief pending disposition of plaintiffs' appeal. *Doe v. McMillan*, 442 F.2d 879. On January 20, 1972, the Court of Appeals affirmed the decision of the District Court. *Doe v. McMillan*, 459 F.2d 1304. On May 29, 1973, the Supreme Court remanded this case to the Court of Appeals for further proceedings consistent with the Supreme Court's opinion. *Doe v. McMillan*, 412 U.S. 306. By order filed October 15, 1973, the Court of Appeals ordered "that this case is remanded to the United States District Court for further proceedings not inconsistent with the May 29, 1973 opinion of the Supreme Court." Accordingly, the matter is now before the Court for resolution in accordance with the Supreme Court's May 29, 1973 opinion.

Upon consideration of the record, the motions, affidavits and memoranda of the parties, and after

hearing argument of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On January 8, 1971, plaintiffs, under pseudonyms, brought this action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all other children and parents similarly situated. The named defendants included the Public Printer at the time, Mr. Adolphus N. Spence and the Superintendent of Documents, Mr. Robert E. Kling.

2. Mr. Spence passed away on January 11, 1972.

3. By resolution adopted February 5, 1969, H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration of any department or agency of the government of the District of Columbia * * * [or] of any independent agency or instrumentality of government operating solely within the District of Columbia. . . ."

4. On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House of Representatives a report, H. Rept. No. 91-1681, 91st Cong., 2nd Sess. (1970), (hereinafter referred to as "the Report"), which was stated to be the Report directed to be prepared by said H. Res. No. 76.

5. On the same day, December 8, 1970, the Report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Congressional Record 40311 (1970). Thereafter the Report was printed and distributed by the Government Printing Office pursuant to Title 44, United States Code, as more particularly described below.

6. The printing of the Report was routine, usual and as a matter of course followed the same regular, customary and orderly procedures as requisitions for all Congressional printing and binding of bills, laws and reports from Congressional Committees.

7. A total number of 2,557 copies of the Report were delivered to offices of the House of Representatives on December 15, 1970. A total number of 796 copies of the Report were delivered on December 28, 1970 to various departments of the Government. Two copies of the Report were retained by the Production Department of the Government Printing Office.

8. Seven hundred and ninety-six copies of the Report were placed, and are still secured, in a locked security cage at the Government Printing Office since a restraining order was issued by the United States Circuit Court of Appeals for the District of Columbia on January 14, 1971, No. 71-1027, enjoining Adolphus N. Spence, Public Printer, and Robert E. Kling, Superintendent of Documents, from further printing and distribution of said H. Rept. No. 91-1681, 91st Cong., 2nd Sess., December 8, 1970, so long as it contained the names and addresses of pupils and parents.

9. In addition to the quantity of Reports scheduled for distribution, 54 extra copies of all House Reports have been for many years, and are, routinely scheduled

to be printed and are designated as "Emergencies", although the number of emergency copies actually available may vary from job to job depending on spoilage, since it is impossible to determine the exact number finally available until press and binding operations are completed. Emergency copies are retained in the Binding Division of the Government Printing Office, but a record of the number of Emergency copies actually on hand is not made. They are considered as extra copies made to fulfill requirements in case of shortage, deficiencies, or Office needs. After a reasonable period of time has elapsed (usually about three months) any surplus Emergency copies are reduced to waste scrap together with other waste paper through an automatic process of shredding, baling, and then sold as salvage paper.

10. In the instant case, following the usual, normal and customary procedure, the Emergency copies of the Report were retained by the Binding Division as described. One of the extra copies was retained by the Library of the Superintendent of Documents for the normal and customary purpose of preparation for microfilming by the Library of Congress. The copy was not microfilmed and is still in the possession of the GPO.

11. One of the extra copies was retained by the Library of the Superintendent of Documents as a catalog copy and is still in the possession of the GPO.

12. One of the extra copies was placed in the work jacket for billing purposes and is still in the possession of the GPO.

13. One of the extra copies was delivered to the Office of General Counsel, U.S. Government Printing

Office, for use in the present litigation and is still in the possession of the GPO. There were no requisitions submitted by the Superintendent of Documents for copies for sale and distribution.

14. A recent survey by Government Printing Office Production personnel disclosed that 796 copies of the Report, as described in paragraph 8, are still secured in the security cage in Room C319, Security area, U.S. Government Printing Office. No Emergency copies exist other than those accounted for herein. To further verify this, a thorough search of the U.S. Government Printing Office Bindery Production area was conducted during the month of December 1973, and a complete search of the entire GPO production area was conducted during the week of February 4, 1974. It was reported that the 796 copies of the Report remained secure in the locked cage and that there is no evidence or record of the existence of any other Emergency copies. Inquiries and discussions directed to present former officials, particularly the Night Superintendent of Binding, failed to provide any further information regarding the Report. Consequently, in the normal course of events, and as standard Office procedure they would have been destroyed by automatic shredding, baling and then sold as waste paper.

15. No additional copies of the Report have ever been printed at the United States Government Printing Office, nor were any copies of the Report ever delivered, shipped, issued or placed under the custody or control of the Superintendent of Documents for distribution to State libraries, designated depositories, Foreign Legations, or other agencies; no copies of the Report were ever distributed, issued, sent in response to

mail orders through the United States Postal Service, or sold by the Superintendent of Documents and delivered to the public in any of the retail bookstores operated in the metropolitan Washington, D.C. area, or at any of the retail branch Superintendent of Documents bookstores located in various metropolitan areas throughout the United States.

16. The statutes of the United States created the office of Public Printer to manage and supervise the Government Printing Office, which, with certain exceptions, is the authorized printer for the various branches of the Federal Government. 44 U.S.C. §301. "Printing or binding may be done at the Government Printing Office only when authorized by law." §501. The Public Printer is authorized to do printing for Congress, §§701-741, 901-910, as well as for the Executive and Judicial Branches of Government.

17. The Superintendent of Documents has charge of the distribution of all public documents except those printed for use of the executive departments, "which shall be delivered to the departments," and for either House of Congress, "which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service." §1702. He is thus in charge of the public sale and distribution of documents. The Public Printer is instructed to "print additional copies of a Government publication, not confidential in character, required for sale to the public by the Superintendent of Documents," subject to regulation by the Joint Committee on Printing. §1705.

18. The duties of the Public Printer and his appointee, the Superintendent of Documents, are to print, handle, distribute, and sell Government documents. The Government Printing Office acts as a service

organization for the branches of the Government. What it prints is produced elsewhere and is printed and distributed at the direction of the Congress, the departments, the independent agencies and offices, or the Judicial Branch of the Government.

CONCLUSIONS OF LAW

1. In *Doe v. McMillan*, 412 U.S. 306 (1973), the Supreme Court affirmed the lower Court's ruling dismissing this action as to the United States, the District of Columbia respondents and the Congressmen and their staff and aides named as defendants by the complaint. 412 U.S. 306, 310, n.4, 324, n.15. Accordingly, this action was remanded, only as to the Public Printer, United States Government Printing Office, at the time of the events leading to this litigation, Adolphus N. Spence (listed in the complaint as Nicholas A. Spence), and the Superintendent of Documents at the time, Robert E. Kling (listed in the complaint as Robert E. King).

2. The Supreme Court's remand left a single, narrow issue to be decided by the Court:

> [W]hether any part of the previous publication and public distribution by respondents other than the Members of Congress and Committee personnel went beyond the limits of the legislative immunity provided by the Speech or Debate Clause of the Constitution. (412 U.S. at 318)

The Court noted that it was unable to decide whether the Superintendent of Documents or the Public Printer "participate[d] in distributions of actionable material

beyond the reasonable bounds of the legislative task" (412) U.S. at 315) because the Court was

> unaware, from this record, of the extent of the publication and distribution of the Report which has taken place to date. (412 U.S. at 324)

3. The record now before the Court, as summarized in the above Findings of Fact, establishes that all the actions of the two remaining defendants upon which plaintiffs seek to predicate this action did not exceed the legitimate legislative needs of Congress and thus their actions remained within the limits of immunity of the Speech or Debate Clause and the doctrine of official immunity.

4. As to defendant Spence, the action abated at his death. 12 D.C. Code §101.

5. For all the foregoing reasons defendants are entitled to judgment as a matter of law and that therefore judgment should be entered in favor of defendants. An appropriate order has this date been entered.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

April 29, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 56-71
JOHN L. McMILLAN *et al.*, Defendants.	)	

ORDER

Upon consideration of plaintiffs' motion for leave to file a first amended complaint as to the Superintendent of Documents and the Public Printer, and the plaintiffs' proposed order permitting said first amended complaint to be filed as to all defendants, and in further consideration of plaintiffs' motion to add an additional party defendant and it appearing to the Court that:

1. The Supreme Court in *Doe v. McMillan*, 412 U.S. 306 (1973), affirmed the dismissal of the complaint in the above-captioned action as to all defendants except the Superintendent of Documents and the Public Printer;

2. Plaintiffs are estopped by virtue of the Supreme Court's above-mentioned opinion from amending their complaint as to those defendants whose dismissals were affirmed;

3. As to defendants Spence and Kling, the Public Printer and Superintendent of Documents respectively, the proposed first amended complaint, insofar as it reiterates allegations of fact and theories of recovery previously raised, has been disposed of by the Court's

order entered this date granting defendants Spence and Kling summary judgment;

4. As to defendants Spence and Kling, the proposed first amended complaint, insofar as it raises new allegations of fact and theories of recovery, will unduly prejudice the rights of defendants in the defense of this action if permitted to be filed at this time;

5. Irrespective of the theories of recovery alleged, the plaintiffs have not produced any relevant evidence which would demonstrate that the defendants Spence and Kling acted beyond the scope of their immunity under the Speech or Debate Clause and the doctrine of official immunity;

WHEREFORE, it is this 29th day of April, 1974,

ORDERED, that plaintiffs' motion for leave to file first amended complaint as against defendants Spence and Kling be, and the same hereby is, denied; and it is

FURTHER ORDERED, that plaintiffs' proposed first amended complaint, as it relates to all defendants except defendants Kling and Spence, no motion for leave to file with regard to same having been filed, be, and the same hereby is, stricken; and it is

FURTHER ORDERED, that plaintiffs' motion for leave to add an additional party defendant be, and the same hereby is, denied.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

29 April 74

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, et al. Plaintiffs v. JOHN L. MCMILLAN, et al. Defendants	))))))	Civil Action No. 56-71

AFFIDAVIT

1. Upon information and belief, I, Thomas F. McCormick being duly sworn, depose and say:

2. I was appointed to the Office of Public Printer on March 1, 1973, to take charge and manage the United States Government Printing Office, in the Legislative branch of Government, pursuant to 44 U.S.C. 301. My predecessor in Office, Mr. Adolphus N. Spence was Public Printer from April 1, 1970 to January 11, 1972 on which day Mr. Spence passed away. From January 11, 1972 to January 31, 1973, when he retired, Mr. Harry J. Humphrey, Deputy Public Printer, fulfilled the responsibility of operating the Government Printing Office as Acting Public Printer. Mr. Leonard T. Golden, was temporarily in charge of the U.S. Government Printing Office as "Acting" Deputy Public Printer from February 1, 1973 to March 1, 1973.

3. The Public Printer is authorized to appoint the Superintendent of Documents, whose duties include in part general supervision of the distribution and sale of all public documents pursuant to 44 U.S.C. 1701-1723. Mr. Robert E. Kling was the Superintendent of

Documents from December 17, 1970 to June 29, 1973, on which date he retired from Government service. Mr. Wellington H. Lewis was appointed Assistant Public Printer (Public Documents) June 24, 1973.

4. The Congress is required by 44 U.S.C. 501, to have its printing done at the Government Printing Office.

5. I have no personal knowledge, nor did I participate in any way in the events involved in the civil action entitled *Doe, et al. v. McMillan, et al.*, United States District Court for the District of Columbia, Civil Action No. 56-71. The facts stated in this affidavit are based on my official knowledge as Public Printer of the United States.

6. House Resolution No. 76, 91st Congress, 1st Session (adopted February 5, 1969), authorized the Committee on the District of Columbia or its subcommittee to conduct a specified investigation and study. A copy of House Resolution No. 76 is attached hereto as Appendix A.

7. On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House of Representatives a report, H. Rep. No. 91-1681, 91st Congress, 2nd Session (1970), (hereafter referred to as "the Report"), which was stated to be the Report directed to be prepared by said E. Res. No. 76.

8. On the same day, December 8, 1970, the Report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Congressional Record 40311 (1970). Thereafter the Report was printed and distributed by the Government Printing Office pursuant to Title 44, United States Code, as more particularly described below.

9. The printing of the Report was routine, usual and as a matter of course followed the same regular, customary and orderly procedures as requisitions for all Congressional printing and binding of bills, laws and reports from Congressional Committees. The procedures routinely are carried out as follows:

(a) A requisition for printing is submitted to the Government Printing Office by the respective House Congressional Committee together with a copy of the manuscript.

(b) The requisition is channeled to the Customer Service Department and referred to the section handling Congressional printing:

(c) Upon receipt of the requisition the Chief, Congressional Information Section, determines whether the printing is properly authorized and assigns a requisition number and work jacket and jacket number for identification. In the instant case the jacket number established was 52-353.

(d) The work jacket and accompanying papers are forwarded to Plant Planning Section for determination of the production plans. Entries of certain data as the job progresses are incorporated into the jacket, including the date received by each section for their respective phase of the production process. Additional information is maintained in the records of each work section.

(e) Publications requiring composition by hot metal process (as in this case) are forwarded to the composition department where type is set and proofs are initially prepared. The proofs are then delivered to the ordering Committee for review.

(f) Upon review by the Committee and the inclusion of changes, if any, the proofs are returned to the Planning Service Division, and then submitted to the Production Department for revision or correction. Revised proofs may be requested by the Committee. Revised proofs were requested twice in this instance.

(g) When authority to print is received the report is printed, bound and delivered in accordance with the data and references provided on the work jacket.

(h) The work jacket, requisition and accompanying papers together with the records of each work section, represent the printing, binding and distribution record of the job from the date of the receipt of the requisition to the date of delivery. Much of the information in this affidavit was obtained from the foregoing sources.

10. 4,204 copies of the Report were scheduled for printing and distribution as follows:

Number of Copies

1. 725 – House Committee on the District of Columbia
2. 300 – Joint Committee on Printing
3. 1,532 – (Usual number (44 U.S.C. 701) for regular distribution of House Committee Report
4. 796 – For distribution to Federal agencies and establishments of the Government based on statutory requirements and standing requisitions for all Committee reports.
5. 700 – To Superintendent of Documents for distribution to State libraries and designated depositories (case bound).

6. 64 – Foreign Exchanges
7. 4 – Library of Congress
8. 3 – National Archives
9. 2 – Senate Library
10. 22 – Capitol – hold for binding
11. 2 – Production Department, GPO
12. 54 – Emergencies

4,204

11. A total number of 2,557 copies of the report (the combined total of the first three items listed in paragraph 10) were delivered to offices of the House of Representatives on December 15, 1970. A total number of 796 copies of the report were delivered on December 28, 1970 to various departments of the Government (Item 4, paragraph 10). Two copies of the report were retained by the Production Department, GPO. (Item 11, paragraph 10).

12. Office records indicate that 796 copies of the report (the combined total of Items 5 through 10 listed in paragraph 10 plus one extra) were placed, and are still secured, in a locked security cage at the Government Printing Office since a restraining order was issued by the United States Circuit Court of Appeals for the District of Columbia on January 14, 1971, No. 71-1027, enjoining Adolphus N. Spence, Public Printer, and Robert E. Kling, Superintendent of Documents, from further printing and distribution of said H. Rept. No. 91-1681, 91st Congress, 2nd Session, December 8, 1970, so long as it contained the names and addresses of pupils and parents. On March 11, 1971, the U.S. Circuit Court of Appeals modified the earlier injunction, to permit publication of students absent from school.

13. The report was printed on both offset and letterpress equipment. The type (letterpress) and the negatives and printing plates (offset) used in the printing of H. Rept. No. 91-1681 were processed in the following manner:

(a) Negatives for pages "I" through "VIII" and pages 1 through 88, 217 through 312, 421 through 452, are presently, and have been continuously since the issuance of the restraining order, secured in the Offset Security Plate Room for negatives in the Offset Division, Production Department, GPO. Offset printing plates are not reusable and are routinely scrapped after press operations. New plates are made from the stored negatives should reprints be required.

(b) Lead metal type used in the process of letterpress printing for the balance of the pages of the report was "killed" March 2, 1971. The word "killed" as used in the trade under these circumstances means that the used lead type was melted and molded as lead "pigs" for future use in the plant.

14. In addition to the quantity of Reports scheduled for distribution 54 extra copies of all House Reports (Item 12, paragraph 10) have been for many years, and are, routinely scheduled to be printed and are designated as "Emergencies", although the number of emergency copies actually available may vary from job to job depending on spoilage, since it is impossible to determine the exact number finally available until press and binding operations are completed. Emergency copies are retained in the Binding Division of the Government Printing Office, but a record of the number of Emergency copies actually on hand is not made. They are considered as extra copies made to

fulfill requirements in case of shortages, deficiencies, or Office needs. After a reasonable period of time has elapsed, (usually about three months) any surplus Emergency copies are reduced to waste scrap together with other waste paper through an automatic process of shredding, baling, and then sold as salvage paper.

15. In the instant case, following the usual, normal and customary procedure, the Emergency copies of the Report were retained by the Binding Division as described in paragraph 14. One of the extra copies was retained by the Library of the Superintendent of Documents for the normal and customary purpose of preparation for microfilming by the Library of Congress. The copy was not microfilmed and is still in the possession of the GPO.

One of the extra copies was retained by the Library of the Superintendent of Documents as a catalog copy and is still in the possession of the GPO.

One of the extra copies was placed in the work jacket for billing purposes and is still in the possession of the GPO.

One of the extra copies was delivered to the Office of General Counsel, U.S. Government Printing Office for use in the present litigation and is still in the possession of the GPO. There were no requisitions submitted by the Superintendent of Documents for copies for sale and distribution.

16. A recent survey by the Production personnel disclosed that 796 copies of the Report, as described in paragraph 12, are still secured in the security cage in Room C319, Security area, U.S. Government Printing Office. No Emergency copies exist other than those accounted for herein. To further verify this, a thorough

search of the U.S. Government Printing Office Bindery Production area was conducted during the month of December 1973, and a complete search of the entire GPO production area was conducted during the week of February 4, 1974. It was reported that the 796 copies of the Report remained secure in the locked cage and that there is no evidence or record of the existence of any other Emergency copies. Inquiries and discussions directed to present and former officials, particularly the Night Superintendent of Binding, failed to provide any further information regarding the Report. Consequently, in the normal course of events, and as standard Office procedure they would have been destroyed by automatic shredding, baling and then sold as waste paper. No records are maintained of any publication destroyed in this procedure.

17. No additional copies of the Report have ever been printed at the United States Government Printing Office, nor were any copies of the Report ever delivered, shipped, issued or placed under the custody or control of the Superintendent of Documents for distribution to State libraries, designated depositories, Foreign Legations, or other agencies; no copies of the Report were ever distributed, issued, sent in response to mail orders through the United States Postal Service, or sold by the Superintendent of Documents and delivered to the public in any of the retail bookstores operated in the metropolitan Washington, D.C. area, or at any of

the retail branch Superintendent of Documents bookstores located in various metropolitan areas throughout the United States.

/s/ Thomas F. McCormick
THOMAS F. McCORMICK
Public Printer

Subscribed and Sworn to before me this 12th day of Feb., 1974.

/s/
Notary Public

My commission expires Oct. 14, 1975.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
	)	56-71
JOHN L. McMILLAN, et al.,	)	
Defendants.	)	

AFFIDAVIT OF THOMAS F. McCORMICK

I, Thomas F. McCormick, being duly sworn, depose and say as follows:

1. I was appointed to the Office of Public Printer on March 1, 1973, to take charge and manage the United States Government Printing Office, in the legislative branch of Government, pursuant to 44 U.S.C. 301. My predecessor in Office, Mr. Adolphus N. Spence was Public Printer from April 1, 1970 to January 11, 1972, on which day Mr. Spence passed away. From January 11, 1972 to January 31, 1973, when he retired, Mr. Harry J. Humphrey, Deputy Public Printer, fulfilled the responsibility of operating the Government Printing Office as Acting Public Printer. Mr. Leonard T. Golden, was temporarily in charge of the U.S. Government Printing Office as "Acting" Deputy Public Printer from February 1, 1973 to March 1, 1973.

2. The Public Printer is authorized to appoint the Superintendent of Documents, whose duties include in part general supervision of the distribution and sale of all public documents pursuant to 44 U.S.C. 1701-1723.

Mr. Robert E. Kling was the Superintendent of Documents from December 17, 1970 to June 29, 1973, on which date he retired from Government service. Mr. Wellington H. Lewis was appointed Assistant Public Printer (Superintendent of Documents) June 24, 1973.

3. The affidavit which I executed in the instant litigation, dated February 12, 1974, was executed on the basis of information provided to me in my capacity as Public Printer and was executed by me in my official capacity as Public Printer.

4. The printing and dissemination of congressional reports by the Government Printing Office is a continuing responsibility of the Government Printing Office and follows a routine and ordinary procedure from receipt of the document until the dissemination thereof through the usual and normal channels. I have caused a search to be made of Government Printing Office documents and materials. No document or other information whatsoever has been found, and I know of no such document or other information, which indicates anything other than that the Congressional Report which is the subject matter of the instant litigation was printed and disseminated in the usual and routine manner by which all congressional reports are printed and distributed. Accordingly, I reaffirm the facts stated in paragraph 9 of my prior affidavit as follows:

> 9. The printing of the Report was routine, usual and as a matter of course followed the same regular, customary and orderly procedures as requisitions for all Congressional printing and binding of bills, laws and reports from Congressional Committees. The procedures routinely are carried out as follows:

(a) A requisition for printing is submitted to the Government Printing Office by the respective House Congressional Committee together with a copy of the manuscript.

(b) The requisition is channeled to the Customer Service Department and referred to the section handling congressional printing.

(c) Upon receipt of the requisition the Chief, Congressional Information Section, determines whether the printing is properly authorized and assigns a requisition number and work jacket and jacket number for identification. In the instant case the jacket number established was 52-353.

(d) The work jacket and accompanying papers are forwarded to Plant Planning Section for determination of the production plans. Entries of certain data as the job progresses are incorporated into the jacket, including the date received by each section for their respective phase of the production process. Additional information is maintained in the records of each work section.

(e) Publications requiring composition by hot metal process (as in this case) are forwarded to the composition department where type is set and proofs are initially prepared. The proofs are then delivered to the ordering Committee for review.

(f) Upon review by the Committee and the inclusion of changes, if any, the proofs are returned to the Planning Service Division, and then submitted to the Production Department for revision or correction. Revised proofs may be requested by the Committee. Revised proofs were requested twice in this instance.

(g) When authority to print is received the report is printed, bound and delivered in accordance with the data and references provided on the work jacket.

(h) The work jacket, requisition and accompanying papers together with the records of each

work section, represent the printing, binding and distribution record of the job from the date of the receipt of the requisition to the date of delivery.

5. The work jacket referred to above for the Report is attached hereto as Appendix A. Normally, reports in excess of 100 printed pages or those containing illustrations are assigned individual work jackets and the distribution of a Report is routinely recorded on the work jacket. Reports of less than 100 pages, containing no illustrations are assigned to the appropriate congressional open jacket.

6. My prior affidavit also stated, at paragraphs 10-12 that dissemination occurred as follows:

10. 4,204 copies of the Report were scheduled for printing and distribution as follows:

Number of Copies

1.	725	– House Committee on the District of Columbia
2.	300	– Joint Committee on Printing
3.	1,532	– (Usual number (44 U.S.C. 701) for regular distribution of House Committee Report)
4.	796	– For distribution of Federal agencies and establishments of the Government based on statutory requirements and standing requisitions for all Committee reports.
5.	700	– To Superintendent of Documents for distribution to State libraries and designated depositories (case bound).
6.	64	– Foreign Exchanges
7.	4	– Library of Congress
8.	3	– National Archives
9.	2	– Senate Library
10.	22	– Capitol – hold for binding
11.	2	– Production Department, GPO
12.	54	– Emergencies
	4,204	

11. A total number of 2,557 copies of the report (the combined total of the first three items listed in paragraph 10) were delivered to offices of the House of Representatives on December 15, 1970. A total number of 796 copies of the report were delivered on December 28, 1970 to various departments of the Government (Item 4, paragraph 10). Two copies of the report were retained by the Production Department, GPO. (Item 11, paragraph 10.)

12. Office records indicate that 796 copies of the report (the combined total of Items 5 through 10 listed in paragraph 10 plus one extra) were placed, and are still secured, in a locked security cage at the Government Printing Office since a restraining order was issued by the United States Circuit Court of Appeals for the District of Columbia on January 14, 1971, No. 71-1027, enjoining Adolphus H. Spence, Public Printer, and Robert E. Kling, Superintendent of Documents, from further printing and distribution of said H. Rept. No. 91-1681, 91st Congress, 2nd Session, December 8, 1970, so long as it contained the names and addresses of pupils and parents. On March 11, 1971, the U.S. Circuit Court of Appeals modified the earlier injunction to permit publication of students absent from school.

7. My prior affidavit, including the portions thereof quoted above, remains accurate to the best of my knowledge and information except that Item 4 of paragraph 10 erroneously indicated that the 796 copies specified therein were for distribution only to Federal agencies and establishments of the Government based on statutory requirements and standing requisitions for all Committee reports. This item has since been found to be in error. The category should have read, "Federal

agencies, establishments of the Government and subscription type sales to the public based on statutory requirements and standing requisitions for all Committee reports and Foreign legations pursuant to 44 U.S.C. 1717." Distribution of some portion of the 796 copies specified may have resulted to private persons and institutions pursuant to standing orders from the public for all reports, under the authority of 44 U.S.C. 1705. In addition, 80 copies of all reports have for many years been delivered to the Superintendent of Documents for distribution to Foreign legations in the normal course of business as provided by law. Such distribution would have occurred routinely, and probably did occur pursuant to standing orders for all Congressional Reports on Public Bills on behalf of a number of such persons, and as required by 44 U.S.C. 1717. I would estimate that the number of reports disseminated pursuant to three standing requisitions from the Superintendent of Documents is approximately 92 plus 80 copies which were probably distributed to Foreign legations. However, no record has been found, for the report of concern here, which indicates which of these persons or institutions were in fact sent copies of the Report. The lack of any record of such transmission is in keeping with our standard practice to prepare printed labels which are affixed to the mailing or bundling of reports which are transmitted. After the labels are affixed, the reports are routinely transmitted to the addressee. No record exists as to whether such transmittal does nor does not occur in a specific instance. However, our records do reflect that the Commerce Clearing House had a standing order for 40 copies of each such report (Superintendent of

Documents Requisition 409); the Congressional Monitor had a standing order for three copies (Superintendent of Documents Requisition 417) and 49 additional copies were distributed pursuant to Superintendent of Documents Requisition 415 to persons having standing orders for all such documents for Fiscal Year 1971. The distribution list for standing Superintendent of Documents Requisition 415 is attached hereto as Exhibit B.

8. Nearly all distribution to the public occurs not as a result of standing requisitions, but as the result of transmittal of a report by law for distribution to State libraries, designated depositories, foreign exchanges, in response to mail orders, or by normal bookstore sale by the Superintendent of Documents of stocks purchased by requisition and maintained in inventory for sales to the public. No distribution of the report in these ways has or will occur. I know of no information whatsoever which changes the statements at paragraph 13-16 of my prior affidavit, which statements I hereby reaffirm:

13. The report was printed on both offset and letterpress equipment. The type (letterpress) and the negatives and printing plates (offset) used in the printing of H. Rept. No. 91-1681 were processed in the following manner:

(a) Negatives for pages "I" through 'VIII" and pages 1 through 88, 217 through 312, 421 through 452, are presently, and have been continuously since the issuance of the restraining order, secured in the Offset Security Plate Room for negatives in the Offset Division, Production Department, GPO. Offset printing plates are not reusable and are routinely scrapped after press operations. New plates are made from the stored negatives should reprints be required.

(b) Lead metal type used in the process of letterpress printing for the balance of the pages of the report was "killed" March 2, 1971. The word "killed" as used in the trade under these circumstances means that the used lead type was melted and molded as lead "pigs" for future use in the plant.

14. In addition to the quantity of Reports scheduled for distribution 54 extra copies of all House Reports (Item 12, paragraph 10) have been for many years, and are, routinely scheduled to be printed and are designated as "Emergencies", although the number of Emergency copies actually available may vary from job to job depending on spoilage, since it is impossible to determine the exact number finally available until press and binding operations are completed. Emergency copies are retained in the Binding Division of the Government Printing Office, but a record of the number of Emergency copies actually on hand is not made. They are considered as extra copies made to fulfill requirements in case of shortages, deficiencies, or Office needs. After a reasonable period of time has elapsed, (usually about three months) any surplus Emergency copies are reduced to waste scrap together with other waste paper through an automatic process of shredding, baling, and then sold as salvage paper.

15. In the instant case, following the usual, normal and customary procedure, the Emergency copies of the Report were retained by the Binding Division as described in paragraph 14. One of the extra copies was retained by the Library of the Superintendent of Documents for the normal and customary purpose of preparation for microfilming by the Library of Congress. The copy was not microfilmed and is still in the possession of the GPO.

One of the extra copies was retained by the Library of the Superintendent of Documents as a catalog copy and is still in the possession of the GPO.

One of the extra copies was placed in the work jacket for billing purposes and is still in the possession of the GPO.

One of the extra copies was delivered to the Office of General Counsel, U.S. Government Printing Office for use in the present litigation and is still in the possession of the GPO. There were no requisitions submitted by the Superintendent of Documents for copies for sale and distribution.

16. A recent survey by the Production personnel disclosed that 796 copies of the Report, as described in paragraph 12, are still secured in the security cage in Room C319, Security area, U.S. Government Printing Office. No Emergency copies exist other than those accounted for herein. To further verify this, a thorough search of the U.S. Government Printing Office Bindery Production area was conducted during the month of December 1973, and a complete search of the entire GPO production area was conducted during the week of February 4, 1974. It was reported that the 796 copies of the Report remained secure in the locked cage and that there is no evidence or record of the existence of any other Emergency copies. Inquiries and discussions directed to present and former officials, particularly the Night Superintendent of Binding, failed to provide any further information regarding the Report. Consequently, in the normal course of events, and as standard Office procedure they would have been destroyed by automatic shredding, baling and then sold as waste paper. No records are maintained of any publication destroyed in this procedure.

9. Paragraph 17 of my prior affidavit may have been incomplete because of the following subsequently received information. The Superintendent of Documents routinely maintains an "open" jacket for special orders for printed materials for which no sales copies have been specifically requisitioned. Such copies are ordinarily and routinely obtained from the Emergency stocks maintained in the Bindery Division under the category "emergencies". Such sales are routinely for 2-3 copies and usually account for small numbers of copies of any given publication. No record by title or document number is maintained of any copies purchased by the Superintendent of Documents for such special orders, although the Superintendent of Documents is routinely charged for the total number of pages charged to the "open" jacket in this manner. The availability of materials in this manner is a service that is not advertised and not generally known to the public. Such sales routinely occur as a result of an inquiry from a Member of Congress or from the House or Senate Document Room. Some special order sales of the Report of a small number of copies (probably under 10) therefore may have occurred in the normal, routine course of business.

10. No additional copies of the Report have ever been printed at the United States Government Printing Office, nor were any copies of the Report ever delivered or distributed by the Government Printing Office to depository libraries, for foreign exchanges pursuant to 44 U.S.C. 1719, to the Library of Congress, the National Archives, or the Senate Library. No individual requisitions for the printing of sales copies were received from the Office of the Superintendent of

Documents and no copies of the Report were printed or delivered to the Superintendent of Documents for such purpose. There are no records of any sales to the public by the Superintendent of Documents either in response to orders received through the mail or in any of the retail bookstores operated by the Superintendent of Documents throughout the United States.

11. Based on the facts set forth above and all information available to me as Public Printer, the printing of the Report was routine, usual and as a matter of course followed the same regular, customary and orderly procedures as requisitions for all congressional printing and binding of bills, laws and reports from congressional committees. Moreover, the distribution thereof was routine, usual and as a matter of course followed the same regular, customary and orderly procedures for distribution thereof, except that said distribution was halted as a result of this litigation. As a result, the Report was disseminated to the public to a substantially lesser degree than is usual and customary for all such reports.

/s/ Thomas F. McCormick
THOMAS F. McCORMICK
Public Printer

Subscribed and Sworn to before me this 27th day of May, 1975.

/s/ Mary E. Carbin
Notary Public

My Commission expires Sept. 30, 1975.

ALL REPORTS ON PUBLIC BILLS

American Farms Bureau Federal 425 13th Street, NW Washington, D.C.	1 each
American Medical Association 1523 L Street, NW Washington, D.C.	1 each
American Telephone and Telegraph Company J. Seyman, P.O. Box 1670 Chruch State Station (SPECIAL DELIVERY) New York, NY	1 each
Chicago Tribune Attn: Walter Trohan Suite 1120 1750 Pennsylvania Ave., NW Washington, D.C. 20006	1 each
Chicago Tribune Attn: Charles A. Swutney – Librarian 435 North Michigan Avenue Chicago, Illinois	1 each
Cornell Law Library Myron Taylor Hall Ithaca, New York	1 each
Donovan Leisure, Newton, Lumbard and Irvine Two Wall Street New York, NY	1 each
Harvard University Law School Attn: Library – Acquisition Department Attn: Myrtle A. Moody Cambridge, Massachusetts	1 each

Daryl B. Oldaker
International Harvester Company
401 North Michigan Avenue
Chicago, IL 60611 — 1 each

National Assocation of Electric Companies
Attn: Library
1200 – 18th St., NW
Washington, D.C. — 1 each

New York Times
Attn: Editorial Reference Library
10th Floor
229 West 43rd Street
New York, NY — 1 each

Northwestern University Law School
Attn: Elbert H. Gary Library
357 E. Chicago Avenue
Chicago, Illinois — 1 each

Prentice-Hall
Attn: John Q. Gill
943 Munsey Bldg.
Washington, D.C. — 1 each

Rutgers Law School Library
37 Washington Street
Newark, New Jersey — 1 each

Scripps-Howard Newspaper Alliance
Attn: Mr. L. M. Dorsch – Librarian
1013 13th Street, NW, Room 304
Washington, D.C. — 1 each

Service de la Documentation
Extrangers, Assembles Nationale
Paris 7, Smithsonian Institute
International Exchange Service
Washington, D.C. — 1 each

Union Pacific Railroad Co.
Attn: Mr. F. J. Melia
Vice President and Western General Counsel
1416 Dodge Street
Omaha, Nebraska — 1 each

The Law Library
The University of Michigan
Ann Arbor, Michigan 48104 — 2 each

University of Nebraska
Attn: Law Library
Lincoln, Nebraska — 1 each

U.S. Court of Appeals
Attn: Judges Library, Room 5518
3rd and Constitution Avenue
Washington, D.C. — 1 each

Yale Law School Library
Attn: Pauline M. Gee
New Haven, Connecticut — 1 each

Remayer Associates, Inc.
1010 Wire Bldg.
1000 Vermont Avenue, NW
Washington, D.C. — 1 each

Federal Bar Foundation
Library
1737 H Street, NW
Washington, D.C. — 1 each

School of Law, Library
Fordham University
Lincoln Square New York
New York, NY 10023 — 1 each

Harvard University — 1 each
Attn: Littauer Library
Cambridge, Massachusetts

Law Library — 1 each
Stanford University
Stanford, California

Documents Section — 1 each
Biddle Law Library
University of Pennsylvania
3400 Chestnut St.
Philadelphia, Pennsylvania 19104

The George Washington Library — 1 each
Law Library
620 – 20th St., NW
Washington, D.C. 20006

Acquisitions Library — 1 each
Attn: Robert Van den Berg
The Library
Sir George Williams University
Montreal P. Q. Canada

Federal Reserve Bank of Richmond — 1 each
Attn: Librarian
P.O. Box 1615
Richmond, Virginia 23213

Mr. Oscar J. Miller — 1 each
Law Library
Fleming Law Building
University of Colorado
Boulder, Colorado 80304

Mr. Richard Bank, Law Librarian — 1 each
Loyola University
School of Law
1440 West Ninth Street
Los Angeles, California

Congressional Monitor — 3 each
201 Massachusetts Avenue, NE
Washington, D.C.
Attn: Thomas Joyce

Law Center Library — 1 each
University of Southern California
University Park
Los Angeles, California 90007

University of California — 1 each
Law Library
Davis, California 95616

D.C. Bar Association — 1 each
3513 U.S. Court Housing Bldg.
Washington, D.C. 20001

Camera Deputati 10113 — 1 each
c/o DEA
Via Lima 28
00198 Roma, Italy

Mr. Harold A. Hunter — 3 each
c/o West Publishing Company
170 Old Country Road
Mineola, NY 11501

Allan H. Harrison, Jr. Esq. — 1 each
Wilmer, Cutler and Pickering
Farragut Building
900 – 17th St., NW
Washington, D.C. 20006

Cook County Law Library — 1 each
2900 Chicago Civic Center
Chicago, Illinois 60602
Attn: Miss Charlotte, Stillwell

The Bureau of National Affairs, Inc. — 1 each
Library – Room 236
1231 – 25th Street, NW
Washington, D.C. 20037

Douglas M. Wood — 1 each
Government Affairs Manager
Washington Area
Lockheed Aircraft Corporation
900 17th St., NW
Washington, D.C. 20006

Commonwealth Parliamentary Library — 1 each
c/o Australian Consulate-General
636 Fifth Avenue
New York, NY 10020

Congressional Information Service — 1 each
500 Montgomery Bldg.
Washington, D.C. 20014

ALL PUBLIC BILLS, RESOLUTIONS AND AMENDMENTS

American Farm Bureau Federations — 1 each
425 – 13th Street, NW
Washington, D.C.

American Medical Association — 1 each
1523 L Street, NW
Washington, D.C.

American Telephone and — 1 each
Telegraph Company
J. Seyman, P.O. Box 1670
Church Street Station (SPECIAL DELIVERY)
New York, New York

Life Insurance Association of America — 1 each
Legal Department
277 Park Avenue
New York, New York 10017 D X 7

Chicago Tribune — 1 each
Tribune Tower
Attn: Charles A. Smutney – Librarian
435 North Michigan Avenue
Chicago, Illinois

Chicago Tribune — 1 each
Attn: Walter Trohan
Suite 1120
1720 Pennsylvania Ave., NW
Washington, D.C.

Daryl B. Oldaker — 1 each
International Harvester Company
401 North Michigan Avenue
Chicago, Illinois

National Association of Electric Companies — 1 each
Attention: Library
1200 18th St., NW
Washington, D.C.

National Diet Library — 1 each
Tokyo, Japan
Smithsonian Institute
International Exchange Service
Washington, D.C. 20402

Newmyer Associates, Inc. — 1 each
1010 Wire Bldg.
1000 Vermont Avenue, NW
Washington, D.C.

New York Times — 1 each
Attn: Editorial Reference Library
10th Place – 229 West 43rd St.
New York, NY

Union Pacific Railroad Company — 1 each
Attn: Mr. F. J. Malin
Vice President and Western General Counsel
1416 Dodge St.
Omaha, Nebraska

Cornell Law Library — 1 each
Mytron Taylor Hall
Ithaca, New York

The Librarian — 1 each
The Association of the Bar of the
City of New York
42 West 44th Street
New York, NY 10036

Congressional Monitor — 3 each
201 Massachusetts Avenue, NE
Washington, D.C.
Attn: Thomas Joyce

Mr. Samuel E. Ewing — 1 each
Vice President, Washington
Radio Corporation of America
1725 K Street, NW
Washington, D.C. 20006

Robert M. Kaufman, Esq. — 1 each
300 Park Avenue
New York, NY 10022

Allen H. Harrison, Jr. Esq. — 1 each
Wilmer, Cutler and Pickering
Farragut Building
900 17th Street, NW
Washington, D.C. 20006